

LEGAL REVIEW COMMENTS

LC#: LC0070, To Legal Review Copy, as of
December 13, 2012, 3:42 p.m.

Attorney Reviewer: Todd Everts
Date: December 27, 2012

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

LC0070, as drafted, may raise potential constitutional issues associated with Article V, sections 2, 3, and 14, of the Montana Constitution. Those sections provide:

Section 2. Size. *The size of the legislature shall be provided by law, but the senate shall not have more than 50 or fewer than 40 members and the house shall not have more than 100 or fewer than 80 members. (Emphasis added).*

Section 3. Election and terms. A member of the house of representatives shall be elected for a term of two years and a member of the senate for a term of four years each to begin on a date provided by law. *One-half of the senators shall be elected every two years. (Emphasis added).*

Section 14. Districting and apportionment. (1) *The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each senate district shall be composed of two adjoining house districts, and shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.*

(2) In the legislative session following ratification of this constitution and thereafter in each session preceding each federal population census, a commission of five citizens, none of whom may be public officials, shall be selected to prepare a plan for

redistricting and reapportioning the state into legislative districts and a plan for redistricting the state into congressional districts. The majority and minority leaders of each house shall each designate one commissioner. Within 20 days after their designation, the four commissioners shall select the fifth member, who shall serve as chairman of the commission. If the four members fail to select the fifth member within the time prescribed, a majority of the supreme court shall select him.

(3) Within 90 days after the official final decennial census figures are available, the commission shall file its final plan for congressional districts with the secretary of state and it shall become law.

(4) *The commission shall submit its plan for legislative districts to the legislature at the first regular session after its appointment or after the census figures are available. Within 30 days after submission, the legislature shall return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan for legislative districts with the secretary of state and it shall become law.*

(5) Upon filing both plans, the commission is then dissolved. (Emphasis added).

Pursuant to Article V, section 2, providing that the "size of the legislature shall be provided by law", LC0070, as drafted, statutorily reduces the size of the Legislature. LC0070 provides that after the Districting and Apportionment Commission files its final plan for the legislative districts adjusted for the 2020 decennial census, the Legislature must consist of 90 representatives and 45 senators. (Section 1(2)). At the second regular legislative session after the Districting and Apportionment Commission files its final plan, LC0070 provides that the Legislature must consist of 80 representatives and 40 senators. (Section 1(3)).

A 1973 Attorney General's Opinion concluded that, pursuant to Article V, section 14, of the Constitution, the only body with the power to set the size of the Legislature is the Districting and Apportionment Commission. (35 AG Op. 12 (1973)). An Attorney General's Opinion is binding unless overturned by a state District Court or the Supreme Court. (Section 2-15-501(7), MCA). Consequently, a potential issue is whether LC0070, in legislatively establishing the size of the Legislature, is in conflict with the provisions of Article V, section 14, as interpreted by the Attorney General.

The Attorney General also concluded in 1983 that a senator's term of office could not be shortened as a result of reapportionment and redistricting. (40 A.G. Op. 2 (1983)). It is difficult to reduce the size of the Legislature without shortening the term of a senator given that Article V, section 3, of the Constitution requires that one-half of the senators be elected every 2 years and that Article V, section 14, of the Constitution provides that "The state shall be divided into as many districts as there are members of the house . . ." LC0070, as drafted, requires a size reduction in two phases -- 90 representatives and 45 senators in the year 2021 and 80 representatives and 40 senators in the year 2023. Both reductions mathematically result in shortening the terms of some senators. As a result, LC0070 may raise constitutional conformity issues with Article V, sections 3 and 14, as interpreted by the Attorney General.

Requester Comments: